

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEITH THOMAS,

Petitioner,

v.

A.K. SCRIBNER, WARDEN

Respondent.

CV F 05-0310 AWI DLB HC

ORDER DENYING PETITIONER'S REQUEST
FOR CERTIFICATE OF APPEALABILITY

[Documents #20 & #21]

On December 6, 2005, the Court dismissed Petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, for failure to state a cognizable federal claim and judgment was entered the same date. The court found the petition's challenges to prison officials failure to adhere to the prison's administrative grievance procedure did not challenge the constitutionality of Petitioner's custody.

On December 12, 2005, Petitioner filed a notice of appeal and request of certificate of appealability.

The requirement that a petitioner seek a certificate of appealability is a gate-keeping mechanism that protects the Court of Appeals from having to devote resources to frivolous issues, while at the same time affording petitioners an opportunity to persuade the Court that, through full briefing and argument, the potential merit of claims may appear. Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). However, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal

1 is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336 (2003).

2 The controlling statute, 28 U.S.C. § 2253, provides as follows:

3 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
4 judge, the final order shall be subject to review, on appeal, by the court of appeals for the
circuit in which the proceeding is held.

5 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
of a warrant to remove to another district or place for commitment or trial a person
6 charged with a criminal offense against the United States, or to test the validity of such
person's detention pending removal proceedings.

7 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may
not be taken to the court of appeals from--

8 (A) the final order in a habeas corpus proceeding in which the detention
complained of arises out of process issued by a State court; or

9 (B) the final order in a proceeding under section 2255.

10 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has
made a substantial showing of the denial of a constitutional right.

11 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue
or issues satisfy the showing required by paragraph (2).

12 Accordingly, final orders issued by a federal district court in habeas corpus proceedings
13 are reviewable by the circuit court of appeals, and, in order to have final orders reviewed, a
14 petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253. This Court will issue a
15 certificate of appealability when a petitioner makes a substantial showing of the denial of a
16 constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must
17 establish that “reasonable jurists could debate whether (or, for that matter, agree that) the petition
18 should have been resolved in a different manner or that the issues presented were ‘adequate to
19 deserve encouragement to proceed further’.” Slack v. McDaniel, 529 U.S. 473, 484 (2000)
20 (*quoting* Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

21 In the present case, the Court finds that Petitioner has not made the required substantial
22 showing of the denial of a constitutional right to justify the issuance of a certificate of
23 appealability. Reasonable jurists would not find it debatable that Petitioner has failed to show
24 an entitlement to federal habeas corpus relief. Accordingly, the Court hereby ORDERS that
25 Petitioner’s motion for issuance of a certificate of appealability (Doc. 20), is DENIED.
26 IT IS SO ORDERED.

27 **Dated: December 20, 2005**

28 0m8i78

/s/ Anthony W. Ishii

UNITED STATES DISTRICT JUDGE